



4000-01-U

DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education

ACTION: Notice of decision.

SUMMARY: The Department of Education (Department) gives notice that, on May 23, 2011, an arbitration panel rendered a decision in the matter of Carole Morris v. Kentucky Office for the Blind, Case No. R-S/09-5. This panel was convened by the Department under the Randolph-Sheppard Act (Act) after the Department received a complaint filed by Carole Morris (Complainant).

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the full text of the arbitration panel decision from Mary Yang, U.S. Department of Education, 400 Maryland Avenue, SW., room 5162, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-6327. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll-free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under FOR FURTHER INFORMATION CONTACT.

SUPPLEMENTARY INFORMATION: Under section 6(c) of the Act, 20 U.S.C. 107d-2(c), the Secretary publishes in the Federal Register a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

Background

Complainant alleged that the Kentucky Office for the Blind, the State licensing agency (SLA), violated the Act and its implementing regulations in 34 CFR part 395. Complainant alleged that the SLA violated the Act, implementing regulations and State rules and regulations by improperly administering the policies and procedures of the Kentucky Randolph-Sheppard Vending Facility Program in Complainant's bid to manage the laundry services at the United States Penitentiary McCreary (McCreary Prison) at Pine Knot, Kentucky, administered by United States Department of Justice, Federal Bureau of Prisons.

Complainant was licensed as a Randolph-Sheppard vendor on March 8, 2004. In April 2004, the SLA was approached by McCreary Prison regarding the possibility of installing a laundry vending facility consisting of washer and dryer vending machines at McCreary Prison.

The SLA informed staff at McCreary Prison that the SLA would provide the services or would work out an arrangement

with a third-party contractor. McCreary Prison informed the SLA that it would require a 15 percent commission on the gross sales up front. In May 2005, the SLA agreed to McCreary Prison's terms and the SLA and McCreary Prison officials entered into an Intergovernmental Agreement (IGA) whereby the SLA would provide the laundry services at McCreary Prison.

Following the signing of the IGA between the SLA and McCreary Prison officials, the SLA negotiated a contract with the third-party contractor to install, operate and repair the laundry vending machines for McCreary Prison. Additionally, the SLA developed a subcontract with the third-party contractor to pay 5 percent commission on laundry royalties to Complainant in exchange for the assignment of laundry vending rights.

Thereafter, the laundry vending facility at McCreary Prison produced income and Complainant received commissions. The SLA also received 5 percent of the net proceeds of the laundry vending facility income as set aside fees from Complainant. The set aside fees were used to help pay for the health insurance costs of the vendors. On May 19, 2006, McCreary Prison decided to terminate the laundry vending facility contract and requested that the SLA remove the laundry vending machines by July 1, 2006.

On July 25, 2007, the third-party contractor filed a lawsuit against the SLA for alleged injuries suffered because of the contract termination. The third-party contractor also filed a lawsuit against Complainant for breach of contract since she received commissions from the sales at the laundry vending facility at McCreary Prison. On August 8, 2007, Complainant contacted the SLA to request legal services or payment of legal fees. However, legal counsel for the SLA informed Complainant that the SLA would not pay her legal expenses since she was not an employee of the State. On March 25, 2008, Complainant filed a request for an evidentiary hearing with the SLA concerning its denial of her request for payment of legal fees.

On September 30, 2008, Complainant filed an amended grievance with the SLA adding additional issues to her original evidentiary hearing request. The new issues alleged by Complainant were that: 1) The SLA had denied Complainant the opportunity to maximize her vocational potential; and, 2) as a result, Complainant could have realized a larger income with the appropriate training by the SLA to manage laundry equipment.

On February 6, 2009, a hearing officer denied Complainant's request for payment of legal fees, reimbursement for lost profits and her claim that the SLA

had not maximized her vocational potential. Complainant appealed this decision. On December 4, 2009, the same hearing officer ruled that the SLA must establish a training assistance program to help Complainant maximize her vocational potential. On March 1, 2010, the SLA denied Complainant's claims as final agency action. Complainant then requested the Department to convene a Federal arbitration panel to appeal her grievance.

The Federal arbitration panel initially heard the following issues: 1) whether Complainant's claim is barred under the doctrine of sovereign immunity as alleged by Respondent; and 2) whether Complainant's request for an evidentiary hearing is time-barred. The panel then determined that, if both of these issues were resolved in Complainant's favor, it must hear the following issues: 1) whether the SLA allegedly failed to maximize Complainant's vocational potential in a timely manner; and 2) whether the SLA was responsible for the legal expenses of Complainant in the lawsuit brought against her by the third-party vendor. The panel then concluded that, if Complainant prevails on one or both of these claims, it must determine what remedy she should receive.

Arbitration Panel Decision

After hearing testimony and reviewing all of the evidence, the panel majority denied the SLA's claim of sovereign immunity. Specifically, the panel majority found that, under the Eleventh Amendment, a State is free to waive its sovereign immunity rights. However, under the Kentucky constitution, the power to waive sovereign immunity is vested in the State legislature. The Kentucky legislature enacted a statute that states in relevant part that, "Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or enforcement of contracts or for both."

Accordingly, the panel majority ruled that both the SLA in negotiating the subcontract with the third-party contractor and Complainant receiving commissions from that contract constituted a contract agreement between the SLA and Complainant.

Regarding the timeliness of Complainant's request for an evidentiary hearing, the panel majority concluded that Complainant's deadline to request an evidentiary hearing expired no later than the date the SLA signed the subcontract with the third-party contractor in 2004.

Therefore, Complainant's original request for an evidentiary hearing and her amended request were untimely.

Also, the panel majority concluded that the subcontract with the third-party contractor was initiated by the SLA, including making all of the arrangements with the third-party contractor, drafting the subcontract, and having Complainant sign the subcontract. As a result, the panel majority ruled that Complainant was not provided guidance from the SLA regarding the ramifications for entering into a subcontract, nor did the SLA assist Complainant when McCreary Prison dissolved the subcontract and the third-party contractor sued Complainant.

Accordingly, after consideration, the panel majority ruled that Complainant shall provide the SLA with evidence regarding the amount of legal expenses paid by her to be reimbursed by the SLA.

One panel member concurred with the panel majority's decision regarding the issues of sovereign immunity, 15-day time limit for Complainant to request an evidentiary hearing and maximization of vocational potential.

This panel member dissented from the panel majority's decision regarding Complainant's request for legal fees, stating that there was no evidence that Complainant pursued her rights diligently or that there were extraordinary

circumstances that prevented a timely filing. The panel member also noted that, based on the evidence presented at the hearing, there did not appear to be official documentation or proof on file of the amount of legal fees and expenses paid by Complainant.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the Department.

Electronic Access to This Document: The Official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the Federal Register, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

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Dated: March 29, 2012

Alexa Posny,
Assistant Secretary for
Special Education and
Rehabilitative Services.

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